

## 220 CMR 45.00: POLE ATTACHMENT COMPLAINT AND ENFORCEMENT PROCEDURES

### Section

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45.01: Purpose and Applicability

220 CMR 45.00 provides for complaint and enforcement procedures to ensure that

telecommunications carriers, and cable television system and Open Video System operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-ways on rates, terms and conditions that are just and reasonable. The general procedural rules set forth at 220 CMR 1.00 are also applicable to proceedings initiated under this part except to the extent that they are inconsistent with 220 CMR 45.00.

45.02: Definitions

As used in 220 CMR 45.00, except as otherwise required by the context,

Attachment means any wire or cable for transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat, or

power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph, telephone, electrical or other duct or conduit, or right-of-way owned or controlled, in whole or in part, by one or more utilities.

Back-bolting means the practice of using the "through-bolt" of an existing attachment on a pole to attach new strand and cable or wire to the backside of the pole.

Boxing means the practice of placing new attachments on the side of a pole opposite from existing attachments.

Complainant means a licensee or a utility that files a complaint.

Complaint means a filing by either a licensee or a utility alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this regulation and/or a rate, term or condition for an attachment is not just and reasonable. A complaint shall constitute an initial pleading within the meaning of 220 CMR 1.04(1).

Department means the Department of Telecommunications and Energy.

Denial of access to a utility pole, duct, conduit, or right-of-way means:

(a) any oral or written denial of access by a utility, in whole or in part, within the applicable response period following a licensee's first written request for such access;

(b) any failure by the utility to respond within the applicable response period following a licensee's first written request for such access;

(c) any action or inaction by the utility that prevents, or has the effect of preventing, a licensee or its agents from conducting field-based surveys of the utility's poles, ducts, conduits or rights-of-way, in accordance with the terms of this Section 45;

(c) any unreasonable delay or other interference with licensee's access, once granted, including, but not limited to the ability of licensee, or its agents, to perform make ready, construction of cable and wire facilities, and maintenance of such make ready and facilities in accordance with the terms of this Section 45; or

(d) any unreasonable delays in providing services and information necessary for licensee to achieve and maintain appropriate access.

Extension bracket means a bracket to accommodate a new attachment(s) that extends the new attachment(s) out from the pole at an angle to maintain a clearance between the new attachment(s) and existing attachments.

ILEC means, with respect to an area, any local exchange carrier that: (1) on February 8, 1996, provided telephone exchange service in such area; and (2)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to 47 CFR 69.601(b); or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i) of this definition.

Licensee means any person, firm, company, corporation, partnership, limited liability partnership or company, other than an ILEC, which is authorized to construct lines or cables upon, along, under and across the public ways.

Make ready work means the process of completing rearrangements on, modifications to, or replacement of, a pole, duct or conduit, at the request of a licensee, to create usable space as is necessary to accommodate a request for access; provided, however, that such make ready work shall not include any rearrangement on, modification to, or replacement of, a pole, duct or conduit, that was either required of the utility by applicable law or otherwise necessary to be performed by the utility prior to a licensee's request for access. The practices of back-bolting and boxing, and the use of extension brackets are presumed to be reasonable, safe and reliable means of attaching cable and wire to poles, ducts, conduits and rights-of-way.

Respondent means a licensee or a utility against which a complaint has been filed.

Usable Space means the total space that would be available for attachments, without regard to attachments previously made,

(a) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code, or

(b) within any telegraph, telephone, electrical or other duct or conduit, or right-of-way.

Utility means any person, firm, corporation, company, partnership, limited liability company or partnership, or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits or rights-of-way used or useful, in whole or in part, for supporting or enclosing wires or cables for the transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat or power.

45.03: Request for Information

(1) A utility shall promptly respond in writing to a written request for information (?request for information?) from a licensee regarding usable space that is available on or in the utility?s poles, ducts, conduits and rights of way. The utility shall respond to requests for information as quickly as possible consistent with applicable legal, safety, and reliability requirements, which, in the case of a utility that is an ILEC, shall not exceed 10 business days, if no field-based survey of poles, ducts, conduits or rights-of-way is required, and shall not exceed 20 business days if such a field-based survey is required. The utility?s response shall include a reasonably detailed report indicating the type, kind and amount of any make ready work necessary to accommodate the licensee?s request for access, and a reasonable estimate of the actual cost of such make ready work. In the event the request involves more than 1000 poles or 10 miles of conduit, the parties shall negotiate a mutually satisfactory longer response time. The utility may charge the licensee only for the actual costs incurred by the utility for any necessary (a) field-based surveys, and (b) copies and preparation of maps, drawings or plans, in order to respond to the request for information. The utility may request up-front payment of the reasonable estimated actual cost to respond to an information request. The utility?s estimate will be adjusted to reflect the actual cost upon completion of the request and delivery of the information to licensee. Nothing herein shall require a licensee to use the procedures set forth in this Section 45.03(1), in lieu of the procedure set forth in Section 45.03(2), to obtain information on, or conduct surveys of, a utility?s poles, ducts, conduits and rights-of-way.

(2) The ILEC shall maintain a list of independent, third party contractors that are qualified to respond to requests for information and to perform field-based surveys of a utility?s poles, ducts, conduits and rights-of-way. Licensee shall have the right to engage such contractors, independent of the utility, to provide such information and perform such surveys. A utility shall not take action to prevent, or have the effect of preventing, a listed contractor who has been hired by a licensee from responding to information requests or conducting a survey.

#### 45.04: Duty to Provide Access; Make Ready; Modifications; Notice of Removal, Increase or Modification; and Petition for Interim Relief

(1) A utility shall provide a licensee with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it, on a timely basis and without unreasonable restrictions, terms or conditions. Nondiscriminatory access is access on a first-come, first-served basis; access that can be restricted only on consistently applied nondiscriminatory principles relating to capacity constraints, and safety, engineering, and reliability requirements. An electric utility?s use of its own facilities for internal communications in support of its utility function shall not be considered to establish a comparison for nondiscriminatory access. A utility shall have the ability to negotiate with a licensee the price for access to its poles, ducts, conduits and rights of way. Notwithstanding this obligation, a utility may deny a licensee access to its poles, ducts, conduits, or rights-of-way, only on a non-discriminatory basis (a) where there is

insufficient capacity, or (b) for reasons of safety, reliability and generally applicable engineering purposes.

(2) A licensee's request for access to a utility's poles, ducts, conduits, or rights-of-way must be in writing. A licensee shall be able to request access to up to a maximum of 15,000 poles, and/or 150 miles of conduit or right-of-way, per calendar quarter. A licensee shall indicate in its request for access whether the licensee has used a listed contractor to obtain information on, and to conduct a field-based survey of, the utility's poles, ducts, conduits or rights-of-way, or whether the licensee intends to rely upon the utility to provide such information. If a licensee indicates that it has used a listed contractor to obtain such information and survey, then, licensee shall submit a complete copy of such information and survey to the utility at the time licensee submits its request for access. Such information and survey shall have been obtained and conducted, respectively, within the 6-month period prior to the date of the request. The utility must respond to the licensee's request within the time period established as follows: the utility shall have 5 days for each 1000 poles, or 10 miles of conduit or right-of-way, that are the subject of licensee's request for access, up to a maximum of 45 days. Alternatively, if the licensee indicates that it intends to rely upon the utility to provide information and conduct any necessary surveys, then, the utility must respond to the licensee's request within 45 days of receiving such request. The utility's response shall be in writing and shall either grant or deny a request for access. The utility's response shall include a reasonably detailed report indicating the type, kind and amount of any make ready work necessary to accommodate the licensee's request for access, and a reasonable estimate of the actual cost of such make ready work. The failure of a utility to so respond within the applicable response period shall be deemed an acceptance of the request for access. In the event a utility denies a licensee's request for access, the utility shall specifically detail the reasons for such denial in its written response to licensee, which response (a) shall include all relevant evidence and information supporting such denial, and (b) shall explain how such evidence and information relate to and support a denial of access for reasons of lack of capacity, safety, reliability or engineering standards. If the licensee indicates in its request for access that it intends to rely upon the utility to provide information and conduct any necessary surveys, then, in responding to such request, the utility may charge the licensee only for the actual costs incurred by the utility for any necessary field-based surveys, and/or copies and preparation of maps, drawings or plans. The utility may request up-front payment of the reasonable estimated actual cost to perform such work, to be adjusted upon completion of the utility's response to licensee's request for access.

(3) The ILEC shall maintain a list of independent, third party contractors that are qualified to perform make ready work, and attach and install wire and cable facilities in, on, across or under the utility's pole, ducts, conduits and rights-of-way. This requirement shall not apply to electric utilities. A licensee shall have the right to engage such listed contractors, independent of the utility, to perform any necessary make ready

work or to attach a licensee's cable or wire facilities in, on, across or under, a utility's poles, ducts, conduits and rights-of-way. A utility shall not take action to prevent, or have the effect of preventing, a listed contractor, so hired, from performing such make ready work or attaching such facilities.

(4) A licensee may use its own personnel or agents to perform make ready work or to attach wire and cable facilities in, on, across or under a utility's poles, ducts, conduits and rights-of-way; provided that such personnel and agents are trained and qualified to work on or in the utility's poles, ducts, conduits or rights-of-way.

(5) ILECs shall adopt written guidelines to ensure that licensees and third-party contractors are qualified. These guidelines must be reasonable and objective, and must apply equally to the ILEC's own personnel and the ILEC's own third-party contractors. ILECs must seek industry input when drafting such guidelines.

(6) If a licensee requires a utility to perform make ready work on its poles, ducts, conduits or rights-of-way to accommodate a licensee's request for access, the utility shall perform such work at the licensee's sole expense. The utility may charge only for the actual costs incurred to perform make ready work for licensee. Such make ready work shall be completed as quickly as possible consistent with applicable legal, safety, and reliability requirements, which, in the case of a utility that is an ILEC, shall occur within 30 business days of receipt of payment from licensee of the utility's reasonable estimated actual cost to perform such make ready work. Such payment amount shall be adjusted upon completion of the make ready work to reflect the actual costs incurred to perform such make ready work. If the make ready work involves more than 500 poles or 5 miles of conduit, the parties will negotiate a mutually satisfactory longer time frame to complete such make ready work.

(7) A utility shall provide a licensee no less than 60 days' written notice prior to:

(a) removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the licensee's attachment agreement;

(b) any increase in attachment rates; or

(c) any modification of facilities, other than routine maintenance or modification in response to emergencies or to a request from a governmental authority without giving such notice to a licensee; provided, however, that in such case the affected utility shall provide notification of such modification to licensee at the earliest possible time after such utility learns of such maintenance, modification or governmental request.

(8) In conjunction with the complaint procedure outlined herein, a licensee may file with

the Department a "Petition for Interim Relief" of (a) the action proposed in a notice received pursuant to 220 CMR 45.04(1), or (b) a utility's denial otherwise of access to its poles, ducts, conduits or rights-of-way, within 15 days of the earlier to occur of the receipt of such notice or the utility's other such denial of access. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation or prevention of the licensee's service, a copy of the notice, and certification of service as required by the Department's Procedural Rules. The named respondent may file an answer within seven days of the date on which the Petition for Interim Relief was filed. No further filings with respect to this petition will be considered unless requested or authorized by the Department and no extensions of time will be granted with respect to this petition unless allowed pursuant to 220 CMR 1.02(5).

#### 45.05 Reservation of Capacity

(1) No utility shall adopt, enforce or purport to enforce against a licensee any "hold off," moratorium, reservation of rights or other policy by which it refuses to make currently unused space or capacity on or in its poles, ducts, conduits and rights-of-way available to licensees requesting access to such poles, ducts, conduits and rights-of-way, except as provided for in subsection (2) below.

(2) Notwithstanding the provisions of subsection (1), an electric utility may reserve space for up to 12 months on or in its poles, ducts, conduits and rights-of-way required to serve core utility customers where it demonstrates that: (i) prior to a request for access having been made, the utility had a bona fide development plan in place, and that the specific reservation of attachment capacity is reasonably and specifically needed for the immediate provision (within one year of the request) of its core utility service; (ii) there is no other feasible solution to meeting its immediately foreseeable needs; (iii) there is no available technological means of increasing the capacity of the support structure for additional attachments; and, (iv) it has attempted to negotiate a cooperative solution to the capacity problem in good faith with the party seeking the attachment.

#### 45.06: Nondisclosure Agreements

(1) The utility and licensee seeking access to poles, ducts, conduits or rights-of-way may provide reciprocal standard nondisclosure agreements that permit either party to designate as proprietary information any portion of a request for information or a response thereto, regarding the availability of usable space on or in its poles, ducts, conduits or rights-of-way, or of a request for access to usable space, as well as any maps, plans, drawings or other information, including those that disclose the licensee's plans for where it intends to compete against a utility. Each party shall have a duty: (a) not to use any information which the other contracting party has designated as proprietary, except in order to respond to requests for information or requests for access; and (b) not to disclose such information, except to personnel within the utility

that have an actual, verifiable "need to know" in order to respond to requests for information or requests for access.

(2) Each party shall take every precaution necessary to prevent employees in its field offices or other offices responsible for making or responding to requests for information or requests for access from disclosing any proprietary information of the other party. Under no circumstances may a party disclose such information to marketing, sales or customer representative personnel. Proprietary information shall be disclosed only to personnel in the utility's field offices or other offices responsible for making or responding to such requests who have an actual, verifiable "need to know" for purposes of responding to such requests. Such personnel shall be advised of their duty not to disclose such information to any other person who does not have a "need to know" such information.

(3) Violation of the duty not to disclose proprietary information shall be cause for imposition of such sanctions as, in the Department's judgement, are necessary to deter the party from breaching its duty not to disclose proprietary information in the future. Any violation of the duty not to disclose proprietary information will be accompanied by findings of fact that permit a party whose proprietary information has improperly been disclosed to seek further remedies in a civil action.

#### 45.07: Complaint

(1) A complaint will commence a proceeding under 220 CMR 45.00. Complainants may join together to file a joint complaint.

(2) Every complaint shall conform to the requirements specified in 220 CMR 1.04(1)(b) and shall be accompanied by certification of service on any utility, licensee, or party named as

complainant or respondent. The complaint shall also contain the following:

(a) a copy of the attachment agreement, if any, between the licensee and the utility. If no attachment agreement exists, the petition shall contain:

1. a statement that the utility owns or controls, in whole or in part, those poles, ducts, conduits, or rights-of-way at issue which are used or designated for attachments;
2. a statement that the licensee currently has attachments on such poles, ducts, conduits, or rights-of-way or has requested from the utility that such attachments be placed;

(b) the specific attachment rate, term or condition which is claimed to be unjust or unreasonable;



(c) in any case where it is claimed that a term or condition is unjust or unreasonable, the complaint shall specify all information and argument relied upon to justify said claim;

(d) in any case where it is claimed that a rate is unjust or unreasonable, or that a term or condition requires review of the associated rate, the data, information and argument in support of said claim shall include, but not be limited to, the following, where applicable:

1. the gross investment by the utility for the pole lines;
2. the investment by the utility in appurtenances not used by or useful to the licensee. This may be expressed as a percentage of the gross pole investment, and shall include a list of specific appurtenances considered not used or useful;
3. the depreciation reserve for the gross pole line investment;
4. the total number of poles (A) owned; and (B) controlled or used by the utility;
5. the total number of poles which are the subject of the complaint;
6. the annual carrying charges attributable to the cost of owning a pole, and the specific factors used in the determination of these charges. Annual carrying charges may be expressed as a percentage of net pole investment;
7. the average amount of useable space per pole for those poles used for pole attachments;
8. reimbursements received from the licensee for non-recurring costs.

Data and information should be based on historical or original cost methodology, to the extent possible. Data should be derived from Form M, FERC 1, or other reports filed with

state or regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant upon request, as should the computation of any rate determined by using the formula specified above;

(e) In addition to meeting the other requirements of this section, in any case where it is claimed that a licensee has been improperly denied access to a pole, duct, conduit, right-of-way, the complaint shall include the data and information necessary to support the claim, including:

1. The reasons given for the denial of access to the utility's poles, ducts, conduits, and rights-of-way;
2. The basis for the complainant's claim that the denial of access is improper;
3. The remedy sought by the complainant;
4. A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and
5. A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case;

(f) in any case where it is claimed that a licensee has been improperly denied access to a utility's poles, ducts, conduits, or rights-of-way, anything contained in Section 45 to the contrary notwithstanding, a licensee who has complied with the provisions of Sections 45.04 and 45.07 shall have the right, pending final resolution of such complaint, to install and use temporary attachments on, in, across or under those poles, ducts, conduits or rights-of-way that are the subject of the complaint. A utility shall not prevent a licensee from installing such temporary attachments unless the utility can demonstrate either (1) irreparable harm and likely cessation of the utility's service, or (2) imminent risk of serious bodily harm, as a result of the installation and use of such temporary attachments.

(g) a statement that the utility and licensee have been unable to agree and a brief summary, including dates, of all steps taken to resolve the problem prior to filing; If no such steps were taken, the complainant shall state the reason(s) why; provided, however, that nothing in this subsection (g) shall require a complainant who has been denied access by a utility, in writing or otherwise, to attempt resolution of the dispute for more than seven (7) business days prior to filing a complaint with the Department;

(h) any other information and arguments relied upon to attempt to establish that a rate, term or condition is not reasonable; and

(i) a statement that the complainant requests that a hearing be convened pursuant to 220 CMR 1.06 or that it waives its right to a formal hearing.

(3) Where the attachments involve ducts, conduits or rights-of-way, appropriate and equivalent data and information shall be filed.

(4) All factual allegations set forth in the complaint shall be supported by affidavit(s).

(5) In addition to meeting the other requirements of this section, in any case where it is claimed that a licensee has been improperly charged by a utility either in connection with a request for information (including make ready estimates) and/or a request for access, the complaint shall include the data and information necessary to support the claim, including:

1. The amount invoiced by the utility representing the actual cost of such service(s);
2. The basis for the complainant's claim that the amount of the invoice is improper;
3. The remedy sought by the complainant;
4. A copy of all information given by the utility to support the amount of its invoice. A complaint alleging improper invoicing of costs will not be dismissed if the complainant is unable to obtain a utility's written response to such complainant's request for material supporting the amount of such invoice, or if the utility otherwise denies the complainant any other information needed to establish a prima facie case.

#### 45.08: Response

(1) The response to a complaint under 220 CMR 45.00 shall be filed within 14 days after

service of the document to which the response is directed.

(2) The response shall specifically address all contentions made by the complainant. All factual statements shall be supported by affidavit(s). Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.

(3) The response shall include a statement that the respondent requests that a hearing be convened pursuant to 220 CMR 1.06 or that it waives its right to a formal hearing.

#### 45.09: Procedures Where Formal Hearing is Waived

(1) Applicability. The procedures set forth in 220 CMR 45.09 apply only if no party requests and is granted a hearing. If a full hearing is to be convened, the procedures contained in 220 CMR 1.06 et seq. shall apply.

(2) Notice. The Department shall give public notice by newspaper publication or by such

other means as it deems advisable that a complaint has been filed and docketed. Such notice shall include a brief description of the complaint and shall set a time limit for

filing of petitions to intervene. That time limit shall be no shorter than 14 days after such public notice.

(3) Intervention. The procedures outlined in 220 CMR 1.03 shall generally apply to petitions to intervene under this part. If a person is allowed by the Department to intervene, the Order shall be in writing and shall inform the intervenor of its right to a hearing, its responsibility to request a hearing within seven days after service of the Order, and that failure to make such a request will constitute a waiver of that right. If a hearing is requested and granted, the procedures set forth in 220 CMR 1.06 et seq. shall apply.

(4) Reply and Comments. The complainant shall have 20 days from the date the response is

served to file a reply. Any person permitted to intervene as a party shall have the opportunity to

file comments with the Department not later than 20 days after issuance of the Order permitting

intervention. Any such comments shall be served on all parties and the parties may file a reply to the comments within 20 days after service. Unless authorized by the Department, no further

filings shall be considered.

(5) Meetings and Evidentiary Proceedings. The Department may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary proceedings upon any issues.

(6) Department Consideration of Complaint. In its consideration of the complaint, response,

reply, and comments the Department may take notice of any information contained in publicly

available filings made by the parties and may accept, subject to rebuttal, studies that may have

been conducted. The Department may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to

provide information required to be provided by these rules or requested by the Department, or

where costs, values or amounts are disputed, the Department may estimate such costs, values or

amounts it considers reasonable, or may decide adversely to a party who has failed to supply

requested information that is readily available to it, or both.

#### 45.10: Remedies

If the Department determines that the rate, term or condition complained of is not just and

reasonable, it may prescribe a just and reasonable rate, term or condition and may:

(1) terminate the unjust and unreasonable rate, term or condition; and

(2) substitute in the attachment agreement the just and reasonable rate, term or condition

established by the Department;

(3) order a refund, or payment, if appropriate. The refund or payment will normally be the

difference between the amount paid under the unjust or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the

Department from the date that the complaint, as acceptable, was filed, plus interest; and

(4) in any circumstances where the Department finds that the losing party's positions were not taken in good faith, require that party to pay the reasonable costs and expenses of the prevailing party, including attorneys' fees.

#### 45.11: Time Limit

The Department shall issue a final Order on the complaint filed in accordance with 220 CMR 45.00 within 180 days after the complaint is filed. In the event a licensee files a complaint with respect to a utility's denial of access, if a final Order, or an interim Order setting forth the reasons why a final Order cannot be timely issued, is not issued within such time frame, the licensee shall have the right to commence or complete the

subject construction, in accordance with applicable safety, reliability and engineering standards, and shall have the right to immediately construct permanent attachments to all poles, ducts, conduits and rights-of-way on, in, across or under which licensee installed temporary attachments pursuant to Section 45.07(f).

#### 45.12: Appeal from Department Decisions

The Department shall notify all parties of their rights to appeal a final decision of the Department pursuant to M.G.L. c. 25, s. 5, and of the time limits on their rights to appeal.

#### 45.13: Prohibition of Discriminatory Rates Charged Any Affiliate, Subsidiary, or Associate

##### Company

A utility that owns or controls poles, ducts, conduits or rights-of-way used in the provision of telecommunications services or cable services shall charge any affiliate, subsidiary, or associate company engaged in the provision of such services, that uses such utility's facilities, an amount equal to the pole attachment rate for which another such company would be liable under this section.

## REGULATORY AUTHORITY

220 CMR 45.00: M.G.L. c. 159A: M.G.L. c. 166 ? 25A.

1. The Federal Communications Commission has determined that Massachusetts has taken the

appropriate steps to invoke jurisdiction concerning the rates, terms and conditions of pole

attachments. 7 FCC Rcd 1498 (Feb. 21, 1992).